

Respondent and its carrier argue that the greater weight of the evidence supports both their argument and the ALJ's finding that claimant was an independent contractor under Kansas law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board (Board) finds the ALJ's preliminary hearing Order should be affirmed.

Claimant was retained by respondent to provide certain construction-related services, including framing, laying sod, trim and tile work. Their relationship is evidenced not only by the parties' conduct, their testimony at the preliminary hearing but also by a written contract.¹ There is no dispute that claimant sustained accidental injury arising out of and in the course of his work on November 25, 2003. In addition, there is apparently no dispute that claimant gave respondent notice of his injury. Rather, it is claimant's status, whether he is an employee or independent contractor, that is at the heart of the preliminary hearing dispute.

According to both claimant and Nancy Nguyen, one of respondent's owners, claimant was paid by the job based upon either a written bid or a verbal agreement negotiated in advance of the job. At the completion of the job, claimant presented an invoice itemizing the work performed. Respondent would pay claimant deducting no taxes. Respondent advanced claimant credit so that he could purchase the necessary tools to perform the work and consistent with both parties' agreement, deducted those monies from claimant's payment.

Both agree respondent purchased all the materials necessary for the jobs. Although Nancy Nguyen may have exhibited some control in the aesthetic aspect of the work and was present at the work site virtually on a daily basis, claimant set his own hours, worked at his own pace and generally performed his work without direct supervision. The parties' contract indicates their relationship was that of principal/independent contractor and that respondent will not be providing workers compensation insurance to claimant.

The only significant factual dispute between the two litigants is whether respondent had the right to fire claimant. Claimant testified he believed he could be fired at any time although it appears Nancy Nguyen did not have that same understanding.

After considering all this evidence, the ALJ concluded "there was insufficient degree of control exercised over the claimant to constitute an employer-employee relationship."² He based this determination upon the principles set forth in *Falls*.³

¹ P.H. Trans., Resp. Ex. C.

² ALJ Order (Feb. 24, 2004) at 1.

³ *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991).

Generally, an independent contractor is someone who contracts to perform a piece of work according to his own methods and without being subject to the control of an employer, except as to the final result.⁴ An employer, however, is someone who employs another to perform services in his affairs and who controls or has the right to control the conduct of the other in performing those services.⁵ Although there are a number of factors to consider when making this decision, particular emphasis is placed on the employer's right to control the worker.⁶

Based upon the evidence contained within the record thus far, it appears that claimant was not an employee of respondent's on November 25, 2003 when he suffered his injury. Claimant was paid by the job, was essentially unsupervised, set his own working hours and methods and ultimately provided his own tools. Accordingly, the ALJ's preliminary hearing Order is affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.⁷

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated February 24, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2004.

BOARD MEMBER

c: Dawn C. Counter, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984); *Krug v. Sutton*, 189 Kan. 96, 366 P.2d 798 (1961).

⁵ *Russell v. H & K Delivery*, Docket No. 192,809, 1998 WL 462620 (Kan. WCAB July 24, 1998).

⁶ *Hartford Underwriters Ins. Co. v. State of Kansas, Dept. of Human Resources*, 272 Kan. 265, 32 P.3d 1146 (2001).

⁷ K.S.A. 44-534a(a)(2).